

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Annual Assessment of the Status of |) | |
| Competition in the Market for the |) | MB Docket No. 05-255 |
| Delivery of Video Programming |) | |
| |) | |

COMMENTS OF CENTURYTEL, INC.

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I. INTRODUCTION AND SUMMARY

On behalf of its operating subsidiaries, CenturyTel, Inc. ("CenturyTel") hereby offers its Comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.¹ Through its operating subsidiaries, CenturyTel provides local exchange, long-distance, dial-up and dedicated broadband Internet access, and other information services predominantly to rural customers in its 22-state local exchange carrier ("LEC") region. CenturyTel has been at the forefront among LECs in acquiring rural exchanges from larger carriers and improving them, and implementing network advancements such as DSL deployment. Through its wholly-owned subsidiary CenturyTel Broadband LLC, CenturyTel plans to offer its customers in many of these rural areas Internet-Protocol based television services ("IPTV") using existing DSL facilities. In 2005 CenturyTel Broadband commenced IPTV service on a trial basis in La Crosse, Wisconsin, and commercial launch of the service is planned for the fourth quarter 2005, subject to the availability of programming.²

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Notice of Inquiry, FCC 05-155 (rel. Aug 12, 2005) ("*Notice of Inquiry*"). CenturyTel responds specifically to paragraphs 53-56 of the Notice of Inquiry.

² Joan Kent, *CenturyTel Request 'Means Competition' for Cable Customers*, LA CROSSE TRIBUNE, Aug. 12, 2005. CenturyTel has twice delayed commencement of commercial service

The Commission appropriately includes LEC-affiliated video service providers in its inquiry into competition in the market for the delivery of video programming, as a number of LECs, large and small, are actively working to deploy video delivery services over a variety of platforms. Companies such as CenturyTel serving rural and smaller markets will be able to bring competitive video programming services through the innovations of IPTV technology.

However, in CenturyTel's experience, LEC-affiliated service providers face two significant impediments to commercial delivery of video services: (1) the delays, costs and risks associated with local franchising, including possible build-out requirements; and (2) uncertainty surrounding the availability of programming on competitive terms, without which alternative multichannel video delivery systems would not be commercially viable.

The Commission could stimulate the growth of video competition by clarifying whether certain of its rules apply to IPTV. First, the Commission should clarify that IPTV is not a "cable service" and that DSL and IPTV platforms are not "cable systems," as those terms are defined by the Communications Act of 1934, as amended (the "Act"). Thus, local franchising requirements and other provisions of Title VI of the Act applicable to cable systems and cable service do not apply. Second, the Commission should strengthen program access requirements to help multichannel video programming distributors ("MVPDs") using new technologies obtain essential programming. Specifically, CenturyTel proposes that programming providers be required to allow LECs to "opt in" to the rates and terms of agreements entered into with incumbent cable operators. Appropriate statutory modifications should be recommended to

in this market twice due in large part to delays in obtaining programming agreements. Although CenturyTel Broadband believes it is not providing "cable service" and local franchise requirements do not apply to its IPTV service, the company entered into an interim agreement with the City of La Crosse so that it could begin providing IPTV service on a trial basis in 2005. Under this agreement, CenturyTel reserves its right to assert that its IPTV service is not a "cable service" and thus, not subject to franchising.

Congress to the extent the Commission deems necessary. The availability of programming on non-discriminatory terms would dramatically speed entry by new providers such as CenturyTel Broadband, giving the public the benefit of greater choice and innovative services.

II. LOCAL CABLE FRANCHISING IS AN IMPEDIMENT TO VIDEO DISTRIBUTION BY LECs

CenturyTel believes that, under the plain meaning of the Act, local cable franchising requirements do not apply to IPTV providers affiliated with LECs. As explained in more detail below, local franchising requirements only apply to cable system operators,³ and Commission precedent supports the position that such requirements do not apply to an IPTV service provided by a LEC affiliate using DSL facilities. However, without a clear statement from the Commission that such requirements are not warranted, franchising remains a barrier to entry. The delays and costs associated with obtaining franchises hinder the roll-out of IPTV. Extending franchising requirements to IPTV service offerings could make offering the service prohibitively expensive in some markets, especially if unrealistic build-out requirements are imposed as a condition of the franchise.

The extensive process that CenturyTel undertook to obtain an interim franchise for its IPTV service in La Crosse demonstrates the burdensome delays and costs of franchising. The City of La Crosse was greatly interested in facilitating entry by a competitive video provider and worked diligently with CenturyTel to finalize the process. The incumbent cable operator in La Crosse did not oppose CenturyTel's application. Yet even under these ideal conditions, the complex process of obtaining franchising lasted several months and required significant resources. Multiplying these efforts by the number of franchise areas that CenturyTel Broadband plans to enter would amount to a significant barrier to competitive entry.

³ 47 U.S.C. § 541.

A. IPTV Delivered Over a LEC's Existing Network Is Not a Cable System Because It Does Not "Use" Public Rights-of-Way

Title VI of the Act and local franchising requirements pursuant to the Act apply only to "cable operators,"⁴ which are defined as persons or entities that provide "cable services"⁵ over "cable systems."⁶ Because CenturyTel Broadband and other LEC affiliates are providing IPTV over existing DSL facilities, they are not cable operators providing cable services over cable systems, and local franchising does not apply to these programming providers. A *cable system* is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community."⁷ Expressly excluded from the definition of a cable system are facilities that serve subscribers without "using any public right-of-way."⁸

Local franchising is premised on the regulation of public rights-of-way.⁹ Cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights-of-way in the communities they serve. Both the Act and Commission precedent rely on the use of public rights-of-way to distinguish cable systems from master antenna television ("MATV") and satellite master antenna television ("SMATV") systems,

⁴ *Id.*

⁵ *Id.* § 522(6)

⁶ *Id.* § 522(5).

⁷ *Id.* § 522(7).

⁸ *Id.* § 522(7)(B).

⁹ Local franchising is appropriate for cable operators "because cable makes use of streets and ways." *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Cable Television Report and Order, 36 FCC 2d 143 at ¶ 177 (1972).

which are not subject to franchising.¹⁰ Because IPTV provided over a LEC's existing network does not "use" public rights-of-way, it is not a cable system and therefore is not subject to the franchising requirement of Section 621 of the Act.

The CenturyTel LECs already have obtained permission to use the rights-of-way in question, typically through a state "franchise" but in some states through both state and local permitting processes, for which the LECs already pay a "franchise fee" in most states. The CenturyTel LECs have obtained all necessary state and local franchises to deploy wireline facilities such as DSL pursuant to state law governing telephone utilities, and delivering video content over that transmission facility does not change the nature of the facility, nor should it require a new franchise. Treating an IPTV service as a "cable system" subject to franchising would inappropriately allow states or localities to collect duplicative franchise fees, with no public interest justification, and would severely inhibit the offering of video services over existing infrastructure.

Further, the Commission has held that service providers that lease existing facilities that use public rights-of-way do not "use" such rights-of-way within the meaning of the Act. The Commission has held that a SMATV operator does not "use" a public right-of-way when it transmits signals over lines that are on a public right-of-way and provided by a common carrier through a tariffed service.¹¹ Consistent with this principle, the Commission tentatively

¹⁰ See *In re Definition of a Cable Television System*, Report and Order, 5 FCC Rcd 7638, ¶¶ 20, 27 (1990).

¹¹ See *Entertainment Connections Inc., Motion for Declaratory Ruling*, Memorandum Opinion and Order, 13 FCC Rcd 14277 at ¶ 62 (1998) (*aff'd* by *City of Chicago v. FCC*, 199 F.3d 424, 432-3 (7th Cir. 1999)). The Commission noted a number of factors on which its decision was based, including the fact that: (i) there was an absolute separate of ownership between the programming provider and the common carrier, (ii) the common carrier had no editorial control over the content of the programming provider's programming, and (iii) there was capacity to serve several other programming providers. See *id.* at ¶ 73.

concluded that Internet service providers (“ISPs”) that access rights-of-way through previously franchised systems are not themselves subject to local franchising because they do not “use” public rights-of-way as intended in the Act.¹²

Although some LECs or their affiliates have agreed to pay franchise fees in some markets in order to expedite the commencement of video service, cable franchise fees put these new entrants at a competitive disadvantage vis-à-vis cable operators. Cable operators may provide voice-over-IP (“VoIP”) service without paying additional franchise fees.¹³ If LEC affiliates providing video services are required to pay a franchise fee in addition to fees related to the telecommunications facilities they use, they would be unable to compete with cable operators on price for the same bundle of services. For this reason, if the Commission’s report to Congress touches upon pending legislation to establish national franchising rules, the Commission should recommend that LECs be credited under any such rules for all fees paid to state and local authorities.

B. Build-Out Requirements Are Inappropriate for New Entrants

Many local franchising authorities require monopoly cable operators to build facilities to reach all households in the community as a condition to grant of a franchise. Build-out requirements theoretically serve to prevent possible discrimination by a monopoly cable

¹² See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 102 (2002) (tentatively reaching this conclusion with respect to cable modem service) (“*Cable Broadband Inquiry*”).

¹³ See *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688, 2705 (2005); *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004). After the Commission’s decision in *Vonage* and the U.S. Supreme Court’s decision in *Brand X*, it is clear that VoIP and other cable broadband applications are interstate services that do not require state certification and are not subject to regulation by local authorities.

operator against certain communities that may be less profitable to serve, also called “red-lining.” However, where a competing video provider enters the market, through IPTV or some other technology, build-out requirements should be inapplicable. A new entrant has no market power and minimal market share. Like other franchise requirements, a build-out requirement could be prohibitively expensive and could prevent a new entrant from successfully commencing a competing video service and establish market presence. New entrants could be deterred from entering a market at all if it is required to provide service in areas where they do not yet have facilities or where providing service is technically infeasible.

New entrants are in the best position to determine where it is most efficient to deploy their competitive services. Once these entrants have developed a base of revenue, they will be better able to deploy the competitive service on a more widespread basis. If CenturyTel Broadband and other new providers are unable to employ market-by-market deployment strategies, they could be prevented from successfully introducing service and establishing a market presence at all.

C. Public Policy Supports a Finding That IPTV Is Not Cable Service

In addition to clear statutory language, there are strong public policy arguments to support a finding by the Commission that IPTV is not a cable service. In general, the Commission should regulate IPTV using a “light touch,” as it has done for other new entrants and services. For instance, the Commission declined to impose cable regulations to direct broadcast satellite (“DBS”), SMATV and MMDS when these services were initially deployed.¹⁴

¹⁴ *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 13 FCC Rcd 23254, ¶¶ 56-61 (1998) (declining to impose certain cable-related obligations on DBS since DBS and cable are “separate and distinct services,” “DBS is a relatively new entrant attempting to compete with an established, financially stable cable industry” and the Commission and Congress had concerns regarding

Minimal regulation of IPTV will maximize benefits to consumers by speeding deployment of IPTV and minimizing costs and administrative burdens that would otherwise increase the price of IPTV service to consumers. The Commission has recognized that “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.”¹⁵

IPTV is a value-added service provided over the LEC’s existing DSL broadband network. Thus, companies like CenturyTel Broadband can take advantage of economies of scope and combine IPTV with other existing and future services to offer integrated voice, video and data packages at lower prices. The Commission supports such integration, which is likely to “force more innovation and lower prices, resulting in more individual choice and hence even greater competition.”¹⁶

Further, regulation of IPTV service is unnecessary to promote competition or to protect consumers. Cable regulation was designed for companies with monopoly characteristics. New IPTV entrants have no market power, minimal market share, and typically have no ability

market concentration in the MVPD market); *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775, ¶ 65 (1998) (exempting DBS from requirements to separate security functions in part because “DBS service providers are relatively new entrants in the MVPD service marketplace, particularly when compared to incumbent cable operators”); *Earth Satellite Communications, Inc. Petition for Expedited Special Relief and Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling and Order, 95 FCC 2d 1223, ¶¶ 17-19 (1983) (preempting state and local entry regulation of SMATV that might otherwise “chill development” or impede growth of SMATV), *aff’d sub nom. New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984); *Orth-O-Vision, Inc. Petition for a Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling, and Order, 69 FCC 2d 657, ¶¶ 23, 24 (1978) (preempting an attempt by the New York Commission on Cable Television to require cable franchising for multipoint distribution services (“MDS”) based on the interstate nature of the service and the Commission’s interest in the future deployment of MDS), *recon. denied*, 82 FCC 2d 178 (1980), *aff’d sub nom. New York State Comm’n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982).

¹⁵ *Appropriate Framework for Broadband Access to the internet over Wireline Facilities*, Notice of Proposed Rulemaking, FCC 02-42, ¶ 5 (rel. Feb. 15, 2002).

¹⁶ *IP-Enabled Services*, Notice of Proposed Rulemaking, FCC 04-28, ¶ 70 (rel. Mar. 10, 2004).

to charge above-market rates or institute unfair practices that could harm consumers. The Commission has found that there already is ample competition in the MVPD market and the market for broadband Internet access.¹⁷ Cable operators have the largest market share in the highly competitive MVPD market; the LECs and their affiliates deploying IPTV have no market power.¹⁸ Thus, IPTV will only increase competitive alternatives in markets where such services are introduced.

Moreover, IPTV systems are fundamentally different from cable systems, which are designed for the one-way delivery of multiple channels of video programming simultaneously to subscribers. CenturyTel Broadband customers will retrieve each channel it desires from the network much the same way an Internet user retrieves information from a web page. As an interactive IP-based service, the Commission should treat IPTV in a manner consistent with other IP-based services.

The Commission's recent decisions regarding IP-based services support a finding that IPTV is an information service. The U.S. Supreme Court upheld the Commission's decision to treat cable-delivered Internet access as a "functionally integrated" offering.¹⁹ The Commission subsequently put DSL on equal regulatory footing with cable broadband services.²⁰ IPTV similarly should be treated as an interstate information service integrated with other

¹⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, ¶ 4 (2005) ("MVPD Status Report").

¹⁸ See *MVPD Status Report* at ¶¶ 20, 124.

¹⁹ *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688, 2705 (2005).

²⁰ See FCC News, *FCC Eliminates Mandates Sharing Requirements on Incumbents' Wireline Broadband Internet Access Services* (rel. Aug. 5, 2005).

interactive services, and not subject to state or local requirements.²¹ IPTV delivers video content and the capability to interact with that content over existing DSL facilities, and typically is integrated with an ISP's Internet access offering. The video content is not offered separately from the transmission capability, and thus IPTV is a "functionally integrated" offering. Therefore, much like Internet access service, IPTV should be regulated as an interstate information service and state and local authority should be preempted.

III. LACK OF ACCESS TO PROGRAMMING IS AN IMPEDIMENT TO COMPETITIVE ENTRY

A second but equally problematic barrier to LECs' entry into the MVPD market via IPTV offerings is difficulty obtaining access to programming from established providers. Currently, the Act only prohibits discrimination by programming providers that are affiliated with an MVPD against non-affiliated MVPDs.²² However, without access to all programming available to cable operators, IPTV providers cannot effectively compete with cable and DBS providers. Whether the LECs' lack of access to programming stems from outright discrimination or uncertainty surrounding the status of DSL-delivered video programming services, the Commission should address this impediment to competition.

A. CenturyTel Has Experienced Delays in Obtaining Access to Programming

Congress enacted program access requirements to prevent vertically integrated program suppliers from favoring their affiliated cable operators over nonaffiliated MVPD.²³ In approving the acquisition of the largest DBS provider by a major programming provider, the Commission expressly acknowledged the potential for discrimination is not limited to cable-

²¹ See *NCTA v. Brand X*, 125 S. Ct. at 2697-8.

²² 47 U.S.C. § 548; see also, 47 C.F.R. §§ 76.1001-1002.

²³ Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(5) (1992) ("1992 Cable Act").

affiliated programmers.²⁴ As the Commission has recognized, all MVPDs must have access to popular programming to maintain viable competitors.²⁵ An MVPD is significantly hamstrung in its ability to provide service that is competitive with an incumbent cable operator's without access to "must have" programming for which there is no good substitute.²⁶ Despite the program access requirements of the Act and the Commission's rules, CenturyTel Broadband's access to programming has been hampered by delays imposed by both cable-affiliated and DBS-affiliated vertically-integrated programmers. In many cases, programmers have not responded in a timely manner to CenturyTel Broadband's requests to negotiate, and ongoing negotiations can drag on for months without conclusion in the form of a final agreement. Frequently the terms offered are disadvantageous, with rates 15 percent or more above those offered to CenturyTel Broadband's cable competitor. Although the Commission's rules provide complaint procedures in case of discrimination by vertically-integrated programmers, small MVPDs have no practical recourse but to accept the terms they are offered – without access to programming, they cannot enter the market.

CenturyTel Broadband also has had difficulty negotiating with large programmers that are not vertically integrated, due to the sheer size differential. Small cable operators are able to obtain such programming through content aggregators or programming cooperatives, such as the National Cable Television Cooperative, Inc. ("NCTC"). However, most programming providers do not allow video service providers using IP-based video platforms, or other systems

²⁴ *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 126 (2003).

²⁵ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, ¶ 32 (2002).

²⁶ *Id.* ¶ 4.

that do not meet the Act's definition of a "cable system," to take advantage of such arrangements. Currently, there is no agreement among members of the programming community regarding the applicability of NCTC contracts to IP technology.

Even if the lines of all the rural LECs were aggregated, they would represent only a fraction of the number of subscribers claimed by the large cable providers. As a result, new MVPDs like CenturyTel Broadband are unable to gain any leverage in negotiating with large programmers, whether vertically integrated or independent. CenturyTel therefore proposes that the Commission recommend action to address this problem. Specifically, CenturyTel proposes that new entrants be granted the right to opt in to the terms of the programming agreements entered into by the incumbent cable operator in the market. This right should be similar in concept to the right of competitive LECs ("CLECs") to adopt the same terms for interconnection as are contained in an approved agreement between the incumbent LEC ("ILEC") and another CLEC in the same market, for the remainder of the term of that agreement.²⁷ Like the CLEC, the new MVPD lacks bargaining leverage in dealing with the programmer. Like the ILEC, the programmer may have little incentive to negotiate with the new entrant. In both cases, both parties save time and money negotiating if the new entrant simply may adopt the terms of an existing agreement, and the goal of non-discrimination is served.

B. There Is Uncertainty Surrounding the Compulsory Copyright License for Broadcast Programming

The Copyright Act currently provides a compulsory copyright license in broadcast programming for "cable systems."²⁸ Under the Copyright Act, the definition of a cable system is broader than under the Communications Act, and includes any facility that "makes secondary

²⁷ See 47 U.S.C. § 252(i).

²⁸ 17 U.S.C. § 111(c).

transmissions of [television broadcast station] signals or programs by wires, cables, microwave or other communications channels to subscribing members of the public who pay for such service.”²⁹ While CenturyTel believes this statute is sufficiently broad to encompass IPTV systems, the language leaves open for broadcasters the opportunity to argue that the application of the compulsory license is arguably unclear, and thus, could delay grant of retransmission consent.

Indeed, there are other elements of the compulsory copyright provisions that raise questions as to the applicability of these provisions to IPTV offerings. For instance, the compulsory copyright only applies to “secondary transmissions” made by a cable system. Secondary transmissions refer to transmissions of broadcast signals that are “simultaneous” with the primary transmission, which is made by the broadcaster.³⁰ In an IPTV service, programming is delivered via fiber to a node close to the subscriber premises. When the subscriber selects a channel of programming, the individual channel is downloaded from the node to the subscriber’s premises. Although the retransmission of the signal appears to be simultaneous to the subscriber, the conversion of the signal into an IP format and retrieval of the individual program from the node imply storage and manipulation of data, which could be interpreted as non-simultaneous transmission.

Further, secondary transmissions by a cable system are not covered by the compulsory copyright, and thus are actionable as an act of infringement, if the content of the broadcast signal is “in any way willfully altered by the cable system through changes, deletions,

²⁹ *Id.*, § 111(f).

³⁰ *Id.*

or additions.”³¹ Due to the manipulation of the broadcast signal into IPTV format for transmission over a DSL network, it is unclear whether the transmission by the LEC would be excluded from the compulsory copyright. Without further clarification by the Copyright Office or Congress, uncertainty regarding the compulsory copyright could hinder the deployment of IP-based video services.

IV. CONCLUSION

The Commission can and should address impediments to entry into the MVPD market by IPTV providers. For instance, the Commission should clarify that IPTV and other DSL-based video distribution systems are not “cable systems” and thus, are not subject to the Act’s local franchising requirements. Further, to improve program access, an “opt in” rule should be adopted to ensure new entrants are able to get access to programming on the same terms as the incumbent cable operator. If necessary, the Commission should recommend to Congress statutory changes to allow new entrants to obtain programming on the same terms as incumbent cable operators in the market.

Respectfully submitted,

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³¹ *Id.* § 111(c)(3).